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No. 76-404

In the Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS BRICK COMPANY, AMERICAN BRICK CO., AMPRESS BRICK CO., INC., ANJO, INC., CHICAGO BLOCK CO., INC., E. L. RAMM COMPANY, HEIGHTS BLOCK, INC., JOLIET CONCRETE PRODUCTS, INC. and NORTHFIELD BLOCK CO.,

Petitioners,

vs.

STATE OF ILLINOIS, et al.,

Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

CHARACTERIZATION OF THE PASS-ON ISSUE AS ONE OF STANDING TO SUE IS ERRONEOUS.

Plaintiffs and the *amici curiae* assert that the issue in this case is standing. They cite authority about the expansive scope of the antitrust laws and the "target area" test, and urge that plaintiffs and other indirect purchasers, all of whom are incorrectly assumed to be injured parties, should be allowed to recover their damages. These

arguments, however, miss the point, for the issue in this case is not standing, but rather proof of injury to these parties. In other words, were these indirect purchasers actually injured? Were they victims of the alleged price-fixing conspiracy? Was the alleged overcharge or part of it, in fact, passed on to them?

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court dealt with the pass-on issue and considered what evidence would be sufficient, as a matter of law, to establish a pass-on. In doing so, the Court necessarily rejected the unfounded conjecture (relied upon by plaintiffs and the Seventh Circuit) that overcharges invariably are passed on to consumers. Instead, the proper assumption is that the first purchaser is injured by the overcharge. For indirect purchasers to recover, they must establish *by proof* that a pass-on actually occurred. In *Hanover,* after considering the evidence adduced at trial, including testimony regarding principles of economics in pricing situations, this Court concluded that, because of insuperable evidentiary difficulties, a pass-on could be proved only in pre-existing cost-plus or similar pricing arrangements.

Seeking to apply *Hanover* to the instant case, defendants did not file a motion on the pleadings raising the standing question, *i.e.,* whether plaintiffs are proper persons to file suit. Instead, defendants conducted discovery and then moved for summary judgment on an undisputed factual record which showed that plaintiffs did not fit the cost-plus exception of *Hanover* and thus, as a matter of law, could not prove that they, rather than the direct purchasers, were injured.* Consequently, the issue before

* Plaintiffs' statement (Resp. Br. p. 3.) that defendants admitted that plaintiffs could prove the alleged pass-on and resulting injury is preposterous. Defendants never conceded that. Indeed, a central element of defendants' summary judgment motion has been that plaintiffs cannot prove a pass-on and injury as a matter of law.

the District Court was the substantive merits of plaintiffs' case, the fact of injury or pass-on, and not merely the threshhold issue of standing.

Along with the standing arguments, plaintiffs and the *amici curiae* claim that defendants are asking this Court to adopt a privity requirement for antitrust cases. This is incorrect. Defendants merely agree with this Court's analysis in *Hanover* that, except in cost-plus or similar situations, direct purchasers can prove injury from an overcharge and indirect purchasers cannot. Defendants do not claim that an indirect purchaser who can prove that a pre-existing cost-plus contract or similar pricing arrangement existed will not be able to prove injury and recover. The ultimate result in each case depends not upon privity, *i.e.,* the existence of a contractual relationship or direct dealings with the price-fixer, but rather upon whether the circumstances of the pricing decisions permit proof of injury by subsequent persons in the chain of distribution.

II.

BASED ON THE EVIDENCE IN THE RECORD SHOWING THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT, SUMMARY JUDGMENT WAS PROPER.

Plaintiffs and the *amici curiae* assert that summary judgment should not have been granted because defendants purportedly failed to base their motion on any evidence, and because there were disputed issues of material fact. These assertions are totally incorrect.

This suit was commenced on September 20, 1973. (A. 1.) On November 13, 1973, defendants filed their first set of interrogatories seeking to determine (1) whether plain-

tiffs bought concrete block or buildings of which concrete block was just one component, and (2) for those who bought buildings, whether the block in the buildings had been the subject of pre-existing cost-plus contracts or similar pricing arrangements. (R. 44.) Answers to the interrogatories, in the form of answers to a questionnaire sent out by plaintiffs' counsel, were filed with the District Court. (A. 211 *et seq.*) Part I of the questionnaire sought information about public building projects. (A. 217.) Question I.C specifically requested pricing information, *i.e.*, whether the project was competitively bid, negotiated, cost-plus, or some other arrangement.* (A. 217.) Part II of the questionnaire sought information regarding direct purchases of concrete block. (A. 234.)

The questionnaire answers established that only four public entities bought concrete block; the rest bought buildings. Thus, the assertions that plaintiffs bought concrete block are conclusively incorrect. The questionnaire answers also established that none of the building projects involved cost-plus contracts or any similar pricing arrangements. Instead, the projects were competitively bid. Based upon these facts, defendants moved for summary judgment.

The summary judgment motion was filed on January 6, 1975, fifteen months after the suit was commenced. Plaintiffs filed a brief in opposition to the motion on

* In addition to pricing information, the questionnaires asked for the cost of the total project, cost of the masonry subcontract, cost of the concrete block, identity of the general contractors and masonry subcontractors who were awarded the projects, and other information. (A. 217.) Thus, plaintiffs' statement (Resp. Br. p. 3.) that the answers provided no facts other than that they were indirect purchasers is untrue.

February 4, 1975, but did not submit any affidavits or other evidentiary material.* Plaintiffs did not seek additional time to obtain affidavits or take discovery.** Nor did they utilize the procedure outlined in Fed. R. Civ. Pro. 56(f) to explain why facts essential to their opposition to the motion were unobtainable.

Now plaintiffs seek to overturn the District Court's judgment and to excuse their failure to submit evidence in opposition to the motion on the ground that defendants did not show that there was no genuine issue of material fact. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970). But plaintiffs' argument fails because defendants clearly did establish that there were no genuine issues of material fact. The evidence supporting the motion consisted of

*Since defendants had supported their motion with evidence, plaintiffs were obligated to present sufficient evidence to raise a disputed issue of material fact. Federal Rule of Civil Procedure 56(e) provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

**It has been suggested that plaintiffs were precluded from taking necessary discovery. (Resp. Br. p. 24 n. 10.) That claim is false. Counsel for both sides agreed upon a stay of discovery. A stipulation requesting the stay, signed by plaintiffs' counsel, was filed on February 4, 1975, the same day on which plaintiffs filed their papers in opposition to the summary judgment motion. (R. 100.) On March 5, 1975, Plaintiffs' counsel advised the court that the summary judgment motion was fully briefed and "ripe for decision." (A. 203, 210.)

plaintiffs' own admissions from their interrogatory answers, nothing else.

Consequently, there is no issue as to whether plaintiffs directly bought concrete block. They admitted that they did not; they bought buildings. Similarly, there is no issue as to whether plaintiffs' purchases of building involved cost-plus contracts or similar pricing arrangements.* (See answers to Question I.C.; A. 217-90.) They admitted that they did not; the building contracts resulted from competitive bidding. (*Id.*) Since plaintiffs were indirect purchasers who did not fit the cost-plus exception, defendants were entitled to summary judgment as a matter of law under *Hanover*.

III.

PLAINTIFFS' NEW EVIDENCE SHOULD NOT BE CONSIDERED.

Having failed to present evidence to the District Court as required by Fed. R. Civ. Pr. 56(e), plaintiffs now urge this Court to consider new evidence. (Resp. Br. pp. 25-27.). This additional evidence should be rejected by this Court for several reasons.

First: evidence will not be heard for the first time on appeal. The evidentiary record is made and closed at the District Court level. Plaintiffs had every opportunity to submit evidence and chose not to do so either in opposition to the summary judgment motion or pursuant to a motion for reconsideration. They are not entitled to sit

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* The State of California, as *amicus curiae*, contends that the instant case does involve pre-existing cost-plus pricing. (Br. Cal. pp. 5-6, 12-16.) Since plaintiffs' admissions are to the contrary, that contention and the argument based upon it should be ignored.

silently in the District Court, lose, and then offer evidence on appeal in order to be heard again.

Second: the evidence, which is dehors the record, is not even admissible in this case. Plaintiffs are offering trial testimony and affidavits from the *Master Key* litigation. (Resp. Br. pp. 25-27.) That "evidence" is irrelevant and immaterial to this case. Furthermore, defendants were not parties to that litigation. Their counsel did not examine the witnesses or even have an opportunity to review the complete record for contrary "evidence." Presenting this material to this Court is improper and violates basic notions of fairness.

Third: the gist of the new "evidence" is that contractors merely collect their given costs and add on a percentage for profit. If plaintiffs are now attempting to assert that contractors actually practice cost-plus pricing, that evidence is diametrically opposed to plaintiffs' own interrogatory answers, which stated that the contracts at issue in this case were competitively bid and were not awarded on a cost-plus basis. Plaintiffs should not be allowed to contradict or change their interrogatory answers at this stage. If plaintiffs had wanted to amend their answers, that should have been done in the District Court.

IV.

PLAINTIFFS' NEW EVIDENCE STILL DOES NOT PROVE A PASS-ON.

Assuming *arguendo* that plaintiffs had properly submitted their new evidence to the District Court, they still would not prevail under *Hanover*. As this Court stated, pricing decisions are complex, and normally are not susceptible to being reconstructed after the fact. *Hanover Shoe, Inc.* v. *United States Machinery Corp.*, 392 U.S. 481

at 492 (1968). Only in extremely unusual circumstances, such as pre-existing cost-plus contracts, can one *prove* that an overcharge was passed on by the first purchaser (and then by others in the chain of distribution) when independent, competitive pricing decisions are involved. The failure of proof hinges upon the existence of independent pricing decisions in unrestrained markets, and this is why plaintiffs' case fails here.

Stripped of conclusory verbiage, plaintiffs' evidence would be as follows. Concrete block passes through two levels of independent pricing decisions—the masonry contractors and the general contractors.* The masonry contractor collects the costs of all materials (including concrete block, the price of which includes the alleged overcharge) and labor, and then adds a markup for overhead and profit. The resulting total is the subbid presented to the general contractor. The general contractor, in turn, collects all subbids for a particular project, adds his material and labor costs, and then adds a markup to arrive at his bid on the project. (Resp. Br. pp. 20-21.) Plaintiffs admit that the markup applied by the contractors to their material and labor costs for profit and overhead is variable, and that competition among subcontractors and general contractors affects the amount of that markup. (Resp. Br. pp. 4, 6, 21.)

Based on these facts, plaintiffs argue that, since the full cost of the block is contained in the masonry subcontract bid and since the masonry subbid is reflected in full in the general contractor's bid, the overcharge has been passed on in full to the purchaser of the building. In other

* Plaintiffs have never alleged that the masonry or general contractors were involved in the alleged conspiracy with the block manufacturers regarding the price of block. (A. 6.)

words, the plaintiffs contend that if the block had cost less, the masonry contract would have been less and the general contract would have been less. That conclusion, however, is clearly incorrect. The facts which plaintiffs offer do not establish the key fact—that the direct purchaser (here the masonry contractor) did not in fact and in law absorb the overcharge.

Assume that block cost $1.10 per hundred and that the overcharge was 10¢ of that amount. Clearly the masonry contractor was injured, since he paid the overcharge. If there had been no overcharge, the block would have cost $1.00 per hundred. The next question is whether the masonry contractor passed on the overcharge. In the absence of pre-existing cost-plus contracts, the answer under *Hanover* is that a pass-on cannot be shown.

Here plaintiffs in their interrogatory answers have admitted that the contracts are not of the cost-plus variety. Thus, the masonry contractor charges a price for the masonry subcontract, not separate prices for the bits and pieces. In other words, there is not one price for block, a separate price for mortar, and then a guaranteed, fixed amount for profit and overhead. The masonry contractor is submitting a price for masonry work, *e.g.*, constructed walls, done in place at a specific site.

Since the construction contracts are awarded pursuant to competitive bidding, the masonry contractor, once he has collected the costs for material and labor, must attempt to submit a bid that is low enough to be accepted. He must consider his competition and his own situation. How much does he need a particular job? Is he in a boom time for construction, when he is fairly busy with his equipment fully deployed so that project X is unimportant to him, or is it a slack time for construction so that he needs projects because his machinery is idle or just be-

cause he needs to earn some money? Is the project a big job, a plum, or a small, inconsequential job? Is the project near to the contractor's base of operations or far away involving large transportation costs? How aggressive are his competitors and what will it take to underbid them?

All of these competitive factors, along with the costs of materials and labor, necessarily affect the masonry contractor's pricing decision for the subcontract, *i.e.*, how much of a markup can he charge and still get the contract. If block costs $1.10, he may conclude that he can only mark the job up 5%, whereas he might have been able to mark the job up 8% if block had been only $1.00. If the masonry contractor reduces his markup because block costs more, he is injured by the overcharge and there has been no pass-on. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 at 489 (1968). Even if he does not reduce his markup because block is overpriced, he is still injured and no pass-on is shown because he would have made more profit if the block had cost less. *Id.*

Obviously, the very same inherently impossible proof problems as existed in *Hanover* are present here and preclude the showing of a pass-on either at the masonry contractor level or the general contractor level. Moreover, plaintiffs would have to show a pass-on at both levels to establish that they paid the overcharge for block.*

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* Plaintiffs seek to distinguish *Hanover* on the ground that the price-fixed item there was a capital item used to produce other products and not like concrete block which supposedly goes through a chain of distribution to a consumer. (Resp. Br. pp. 22-23.) Aside from the fact that here concrete block is not merely resold as a separate product through a chain of distribution to plaintiffs as consumers, the "capital item" distinction presents no meaningful difference. In either case, the effect of competitive conditions makes any assumptions as to "normal" pricing decisions impossible.

Plaintiffs argue that they will present expert economists to testify about inelastic demand and the resulting necessity of a pass-on of the overcharge for block. Suffice it to say that this Court in *Hanover* rejected precisely the same evidence. In *Hanover*, the defendant maintained that there could be no injury:

> ". . . where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales." 392 U.S. at 492.

This Court stated that "[w]e are not impressed with the argument that sound laws of economics require recognizing" the existence of a pass-on under those circumstances. *Id.* It was in response to this exact claim that this Court concluded that the "insuperable difficulty" of recreating pricing decisions "in the real economic world rather than an economist's hypothetical model" precluded consideration of the evidence. *Id.* at 493.

In contrast to the foregoing, it is possible to prove a pass-on when pre-existing cost-plus contracts are at issue. The simple reason is that, in those cases, the vagaries of competitive pricing are effectively eliminated. For example, if a manufacturer has a cost-plus contract to supply shoes, he is insulated from changes in costs and competition. Assume the contract provides for the price of shoes to be the costs plus $2. Then regardless of the cost of the materials and labor, the manufacturer always makes $2 per pair of shoes—never more, never less. He does not have to factor the costs into his pricing decision. He never absorbs increased costs; he never makes more if costs go down.

Plaintiffs and the courts deal with, or, more accurately, seek to get around *Hanover* by ignoring it or refusing to

apply it. For instance, they assert that Hanover merely precludes the pass-on defense, but does not preclude use of pass-on as an offense, *i.e.*, a predicate for indirect purchasers' claims for an overcharge. *E.g., In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶74,680 at 94,978 (D. Conn. 1973). In practice, this approach results in an absurd standard of proof on the pass-on issue. Defendants are precluded, as a matter of law, from establishing that direct and indirect purchasers in the chain of distribution passed on overcharges, while at the same time plaintiff-indirect purchasers can make out *prima facie* cases of liability (*i.e.*, a pass-on) with extremely minimal proof. In this regard, the Second Circuit stated:

> "If the appellees [the governmental plaintiffs] establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee." *In re Master Key Antitrust Litigation,* 528 F.2d 5, 12 n. 11 (2d Cir. 1975).

The Second Circuit thus makes no allowance whatsoever for the full absorption of the overcharge at the level of the first purchaser. Without any proof, the Second Circuit assumes that a pass-on did occur, when that is the very issue to be decided.

There is nothing in *Hanover* which supports the proposition that a pass-on is not a defense but that it can be used as an offense in antitrust cases. This Court did not say that it was only impossible for defendants, but not plaintiffs, to prove a pass-on. Instead, this Court indicated that it did not want the pass-on issue to be litigated

throughout the chain of distribution.* 392 U.S. at 494. Plaintiffs' position—that it is easy for indirect purchasers to show a pass-on but that proof by defendants of a pass-on somehow involves "inconclusive and misleading economic inquiry" (Resp. Br. p. 31.)—is untenable; it defies logic. Adoption of such a contradictory standard of proof on this issue would seriously undermine a fair, evenhanded system of justice and might well deny antitrust defendants due process and equal protection of the laws.**

Furthermore, the rationale behind this double standard does not withstand analysis. First, it is stated that the

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* The United States as *amicus curiae* seeks to explain *Hanover* on the ground that there only the direct purchaser (the shoe manufacturer) had a significant enough interest in the overcharge to sue to enforce the antitrust laws. That is incorrect. The shoe manufacturer sold its shoes to only four customers: J. C. Penney, Montgomery Ward, the United States government and Sheppard & Myers, Inc. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 245 F.Supp. 258, 264 (M.D.Pa. 1965). Certainly, these four had sufficient interest and resources to sue.

** Plaintiffs and the *amici curiae* note (Resp. Br. p. 32; Br. Cal. p. 11; Br. Ala. *et al.* pp. 26-27.) that once the fact of damage is been proved plaintiffs' burden in proving the *amount* of damage is reduced if the nature of the violation itself makes ascertainment of the precise amount of damage uncertain. *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 264-265 (1946); *Storey Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 564 (1931); *Terrell* v. *Household Goods Carriers' Bureau,* 494 F.2d 16, 20 (5th Cir. 1974), *petition for cert. dismissed,* 419 U.S. 987 (1974). Here, however, it is not the amount of damage that is in issue. It is whether as a matter of law the first purchaser can be shown to have passed on any of the alleged overcharge. Similarly, it is not the nature of the alleged violation, but the complex nature of independent pricing decisions in a competitive market, that makes the proof of pass-on insurmountable.

indirect purchasers are the victims of the overcharges. As previously discussed, in the vast majority of cases (i.e., in the absence of pre-existing cost-plus arrangements) that is not true. Second, it is asserted that, unless indirect purchasers can sue, wrongdoers will escape liability. (Resp. Br. p. 32.) Again, that is incorrect. The direct purchasers can sue, as they did in this very case.*

Finally, plaintiffs and the *amici curiae* argue that *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), is precedent for allowing recovery by indirect purchaser plaintiffs. The facts in and context of *Perkins,* however, belie this interpretation. In *Perkins,* a suit under the Robinson-Patman Act, 15 U.S.C. §13(a), defendant Standard Oil was alleged to have given discriminatorily low prices not only to certain direct competitors of the plaintiff, but also to a wholesaler which resold to the wholesaler's 60%-owned subsidiary, which again resold to its 55%-owned subsidiary Regal, which was another direct competitor of the plaintiff. Plaintiff's recovery was allowed. Thus in *Perkins,* while the discriminatory low price was "passed on" through two levels, neither level was truly independent but was effectively controlled by the level before it. The application of *Perkins* to price-fixing cases, therefore, would allow indirect purchasers to prove a pass-on only if the purchasers in the chain before them similarly lacked independence. See Handler and Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach,* 85 Yale L.J. 626, 645-646 n. 97 (1976).

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*Plaintiffs criticize the settlement of the direct purchasers claim as being too cheap. (Resp. Br. p. 19.) Plaintiffs views on that subject are irrelevant. What is relevant is that, after notice to the class and a hearing, the District Court approved the settlement, finding it to be fair, reasonable and adequate.

V.

THE DEVICES SUGGESTED TO SOLVE THE SERIOUS PROBLEM OF MULTIPLE RECOVERIES ARE INADEQUATE.

It has been suggested that there is no danger of multiple recoveries in this case because defendants have settled with the other claimants: the direct purchasers and the other indirect purchasers. (Resp. Br. p. 34.) To the contrary, those facts show that multiple recoveries are a real problem. Defendants were sued by the masonry contractors, the direct purchasers, who under *Hanover* had a claim for the full overcharge with no deduction for any alleged pass-on. In spite of having settled that claim, defendants are still subject to the claims of plaintiffs, who have no intention of reducing their claims by the amount which defendants paid in settlement to either the masonry contractors or the general contractors.

Several purported solutions to the multiple recovery problem are offered by plaintiffs and the *amici curiae*: interpleader, transfer under 28 U.S.C. §1404 and §1407, collateral estoppel, laches, and the statute of limitations. None of these will, in fact, solve the problem.

Defendants have already discussed the inadequacy of collateral estoppel. (Pet. Br. p. 18.)

The United States contends that the statute of limitations can effectively preclude double recovery. (Br. U.S. p. 27.) The mechanism by which this would work would require that no judgments in pending cases be entered and no settlements be made until the four year statute of limitations has run.* This, it is urged, provides protection

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* Of course, the statute may not run in four years since it can be tolled.

against subsequent claims, since they would be barred. Obviously, this solution is untenable. The law favors settlement of controversies. It would be inimical to that policy to adopt a rule which means that effective settlements cannot be made for at least four years. It is also unreasonable to defer litigating suits for four years to ensure that subsequent suits will not be filed.

Alternatively, the United States suggests that direct or indirect purchasers who file after other suits have been resolved should be barred by laches. (Br. U.S. pp. 27-28.) But, as long as the statute of limitations has not run, an antitrust claimant cannot be denied on the basis of laches. *Maricopa County* v. *American Pipe & Construction Co.*, 303 F.Supp. 77, 89 (D. Ariz. 1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *petition for cert. dismissed*, 471 U.S. 801 (1973).

Consolidation and transfer will not necessarily work. In the first place, transfer under 28 U.S.C. §1407 is only for *pretrial* proceedings. In the second place, these devices depend on the discretion of individual judges as well as the development of each lawsuit. For example, if lawsuit A is filed in 1970 and is ready for trial in 1972, it is unlikely that lawsuit B filed in 1972 would be transferred and consolidated with it.

Interpleader under 28 U.S.C. §1335 also will not work. Putting aside the procedural difficulties of whether interpleader is available to a defendant and how it would be accomplished,* the proposed solution would result in an absurd situation. For example, assume that only the ma-

* Under Fed. R. Civ. Pro. 22(1) defendants cannot interplead non-parties. *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 705 n. 2 (1972).

sonry contractors had sued defendants. The interpleader "solution" would require defendants, who deny that there even was a price-fixing conspiracy, to bring into the suit all of the general contractors and all purchasers of buildings for the relevant four year period. Indeed, since the State was one of the purchasers of buildings, are all of the taxpayers in Illinois to be made parties to the suit, since under plaintiffs' theory, the State may have passed on the alleged overcharge to them? Defendants are unlikely even to know everyone who would have to be brought into the suit.

Finally, putting aside the difficulties presented by each particular "solution," there is a fundamental defect to the solutions which plaintiffs and the *amici curiae* ignore. For underlying all of these proposed solutions is the premise that the overcharge is going to be fairly and correctly apportioned among all of the direct and indirect purchasers. But since the basic premise is faulty, the solutions are irrelevant. Under *Hanover*, the direct purchaser is entitled to the full overcharge. He does not have to prove that he did not pass on the overcharge in order to recover. Consequently, there is nothing to apportion among the indirect purchasers.

VI.

THIS COURT SHOULD CONTINUE TO APPLY HANOVER.

Plaintiffs and the *amici curiae* would have this Court adopt a rule that all indirect purchasers can sue defendants for and recover the same alleged pass-on (even in the absence of cost-plus or similar pricing arrangements), while at the same time precluding defendants from defending against any purchaser (direct or indirect) on the ground that the overcharge was or was not passed on. Plaintiffs and the *amici curiae* would also add to the rule

that the overcharge can be apportioned. The reasons offered by plaintiffs for their position are as follows: that the indirect purchasers are the injured parties who should be compensated, that the pass-on can be proved easily, and that allowing indirect purchasers to sue enhances the enforcement of the antitrust laws.

Defendants submit that the rule suggested by plaintiffs and the reasons behind it are unsound. First, as already discussed at length, the two *basic* premises of plaintiffs and the *amici curiae* are incorrect. The indirect purchasers normally are not the injured parties of an overcharge. They are the victims only in situations involving cost-plus or very similar pricing arrangements. Similarly, it is anything but simple to prove (as opposed to assuming) that there has been a pass-on. As previously discussed, the courts which have opted for plaintiffs' position either avoid consideration of the proof problems by labeling the issue as standing, thus putting off the day when proof of the indirect purchasers' claim is at hand, or refuse to follow the evidentiary standard for proof of a pass-on as set down in *Hanover*. Defendants submit that this Court's analysis of the issues in *Hanover* is correct.

Second, allowing indirect purchasers to maintain these suits will not enhance private enforcement of the antitrust laws. There are direct purchasers who are willing and able to sue, as evidenced by this very case where the masonry contractors sued. Indeed, eliminating the uncertainty presently existing as to whether the direct or indirect purchaser can sue will encourage the direct purchasers to sue, particularly if the rewards from those suits will be recovery of the full overcharge (trebled) rather than some small portion of the overcharge (or even none at all, if a jury chooses to believe that the overcharge was passed on). Direct purchasers will also be encouraged to

sue because the litigation will not bog down into a never-ending, exceedingly expensive endeavor to trace each overcharge, or worse, parts of overcharges, through a chain of distribution.

Defendants do not contend that their position will result in perfect justice, but then neither will plaintiffs. Defendants do believe that adoption of their position will facilitate the administration of justice and the enforcement of the antitrust laws because the people who are most likely to be the victims of overcharges will be compensated without imposing untenable burdens on our judicial resources.

CONCLUSION

The policy and result of *Hanover* (*i.e.*, that first purchasers recover for overcharges unless there are pre-existing cost-plus contracts or similar pricing arrangements, in which event indirect purchasers can recover) should be reaffirmed. The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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